

1 benefited from this scam, while Plaintiffs and consumers were irreparably harmed by
2 the confusion it undoubtedly caused in the marketplace. Such misconduct should not
3 be tolerated.

4 Plaintiffs manufacture, promote, sell and distribute high-quality denim and
5 apparel products throughout the United States under the well-known MISS ME and
6 ROCK REVIVAL brand names, each of which is the subject of numerous federal
7 trademark registrations. Plaintiffs' MISS ME and ROCK REVIVAL products have
8 achieved substantial sales success and received extensive media coverage. Moreover,
9 Plaintiffs' products are widely recognized for their superior quality, a reputation they
10 have earned by maintaining strict policies that ensure that only the highest quality
11 goods enter the stream of commerce.

12 As a result of their strict quality control procedures, Plaintiffs deem certain
13 MISS ME and ROCK REVIVAL denim products unfit for sale to consumers. Prior
14 to November 2011, Plaintiffs took great care to dispose of such products either by
15 incinerating them at their overseas factories, or cutting them up and depositing them
16 in a landfill. However, in light of the potentially negative environmental impact of
17 these disposal methods, finding an environmentally friendly way to dispose of their
18 second-quality denim products became a high priority for Plaintiffs.

19 In November 2011, Plaintiffs' representative, Lisa Song, on the instruction of
20 her superiors, contacted Bonded Logic, Inc. ("Bonded Logic"), Phoenix Fibers'
21 commonly-owned affiliate, about its program of using denim to manufacture
22 environmentally friendly insulation products, and was referred to Phoenix Fibers.
23 Ms. Song, operating under the supervision of Plaintiffs' then-General Counsel, Lilly
24 Kim, engaged in a series of communications with Phoenix Fibers' then-General
25 Manager, Matt Graham. Ms. Song explained to Mr. Graham Plaintiffs' desire to
26 dispose of their second-quality products in an environmentally friendly way, while
27 Mr. Graham pitched to Ms. Song Phoenix Fibers' business of converting denim into
28 shoddy fiber for Bonded Logic's use in producing insulation and other products.

1 Shortly thereafter, the parties arrived at a mutually beneficial agreement —
2 Plaintiffs would deliver their second-quality MISS ME and ROCK REVIVAL
3 products to Phoenix Fibers’ facility at no cost, and Phoenix Fibers would shred (*i.e.*,
4 destroy) Plaintiffs’ products and convert them into shoddy fiber, which its affiliate
5 Bonded Logic would then use to manufacture environmentally friendly insulation
6 products. Plaintiffs delivered their first load of second-quality denim products to
7 Phoenix Fibers for shredding at the end of November 2011.

8 Thereafter, from November 2011 through September 2015, Plaintiffs shipped
9 approximately one million pounds of second-quality MISS ME and ROCK
10 REVIVAL denim products to Phoenix Fibers for destruction and conversion into
11 shoddy fiber. At no time during this entire period did Phoenix Fibers ever indicate,
12 or even imply, that it was doing (or had the right to do) anything with Plaintiffs’
13 second-quality goods other than destroy them in accordance with the parties’
14 agreement. To the contrary, Phoenix Fibers continued to represent that Plaintiffs’
15 products were being shredded into shoddy fiber.

16 In the summer of 2015, Plaintiffs learned that significant quantities of second-
17 quality MISS ME and ROCK REVIVAL denim products, which Plaintiffs had never
18 authorized to be sold to consumers, were being offered for sale in secondary
19 consumer trade channels. Plaintiffs’ investigation revealed that these were products
20 that had been delivered to Phoenix Fibers for conversion into shoddy fiber under the
21 parties’ 2011 agreement.

22 Accordingly, in October 2015, Ms. Kim contacted Phoenix Fibers to express
23 Plaintiffs’ concern that second-quality products were finding their way out of
24 Phoenix Fibers’ warehouse and into consumer trade channels. Both Tod Kean (CEO
25 of Phoenix Fibers and co-founder of Bonded Logic) and Steven Johnson (Phoenix
26 Fibers’ then-Plant Manager) told Ms. Kim that the problem was the result of
27 “leakage” — *i.e.*, theft — from Phoenix Fibers’ warehouse. In fact, however, as
28 Messrs. Kean and Johnson well knew, Phoenix Fibers had sold these products to

1 Defendant U.S. General Export, Inc. (“U.S. General”). In other words, Phoenix
 2 Fibers repeatedly lied to Plaintiffs, and continued to do so for months; even denying
 3 the existence of any such sales in its Answer filed in this action five months later.

4 Having received only dishonest responses from Phoenix Fibers, in early
 5 December 2015 Plaintiffs hired a private investigator, at significant expense, to
 6 determine the source of the second-quality MISS ME and ROCK REVIVAL denim
 7 products that were flooding consumer trade channels. Between December 2015 and
 8 February 2016, Plaintiffs’ investigators purchased over 29,000 units of such products
 9 from Defendants Comak Trading, Inc. and Lydia Evilsa Terrazas Cho, and SAC
 10 International Traders, Inc. and Shaukat Ali Chohan, at a cost of nearly \$200,000.
 11 Unfortunately, those units turned out to be only the tip of the iceberg. Discovery has
 12 established that all of these goods had been sourced from Defendant U.S. General,
 13 which in turn had purchased them from Phoenix Fibers in cash sales brokered by Mr.
 14 Johnson. Thus, apparently for years, the consumer market has been, and continues to
 15 be flooded with poor quality MISS ME and ROCK REVIVAL products that were
 16 never intended to be sold to the public, but which observers in the post-sale market
 17 will inevitably believe are Plaintiffs’ first-quality goods.

18 **L.R. 16-4.1 CLAIMS AND DEFENSES**

19 **I. Plaintiffs’ Claims**

20 Claim 1: Phoenix Fibers’ unauthorized distribution and/or sale of Plaintiffs’
 21 second-quality goods constitutes a breach of Phoenix Fibers’ agreement with
 22 Plaintiffs only to shred Plaintiffs’ donated second-quality goods and convert them
 23 into shoddy fiber.

24 Claim 2: Defendants’ unauthorized distribution and/or sale of Plaintiffs’
 25 second-quality goods constitutes infringement of Plaintiffs’ federally registered MISS
 26 ME and ROCK REVIVAL trademarks, in violation of 15 U.S.C. § 1114.

1 Claim 3: Defendants' unauthorized distribution and/or sale of Plaintiffs'
2 second-quality goods constitutes false designation of origin and unfair competition,
3 in violation of 15 U.S.C. § 1125(a).

4 Claim 4: Defendants' unauthorized distribution and/or sale of Plaintiffs'
5 second-quality goods constitutes unfair competition, in violation of Cal. Bus. & Prof.
6 Code §§ 17200 *et seq.*

7 Claim 5: Defendants' unauthorized distribution and/or sale of Plaintiffs'
8 second-quality goods constitutes trademark dilution, in violation of Cal. Bus. & Prof.
9 Code § 14247.

10 Claim 6: Defendants' unauthorized distribution and/or sale of Plaintiffs'
11 second-quality goods constitutes trademark infringement and unfair competition
12 under California common law.

13 **II. Elements Required to Establish Plaintiffs' Claims**

14 A. Elements Required to Establish Plaintiffs' Breach of Contract Claim

15 The following elements are required to establish Plaintiffs' claim for breach of
16 contract:

- 17 1. The existence of a contract between Plaintiffs and Phoenix Fibers;
- 18 2. Plaintiffs' performance under the contract;
- 19 3. Phoenix Fibers' breach of the contract; and
- 20 4. Plaintiffs were damaged as a result of Phoenix Fibers' breach.

21 *See Oasis W. Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011). *See*
22 *generally* CACI No. 303, Breach of Contract—Essential Factual Elements.

23 In California, the required elements demonstrating the existence of a contract
24 are:

- 25 1. The parties are capable of contracting;
- 26 2. The parties gave consent;
- 27 3. The contract had a lawful object; and
- 28 4. Sufficient consideration was exchanged.

1 See Cal. Civ. Code § 1550 (West). See generally CACI No. 302, Contract
2 Formation—Essential Factual Elements.

3 B. Elements Required to Establish Plaintiffs’ Trademark Infringement Claim
4 Under 15 U.S.C. § 1114

5 The following elements are required to establish Plaintiffs’ claim for trademark
6 infringement under the Lanham Act:

- 7 1. Plaintiffs own valid and protectable interests in the MISS ME and/or
8 ROCK REVIVAL marks; and
- 9 2. Defendants used Plaintiffs’ MISS ME and/or ROCK REVIVAL marks
10 without consent, and in a manner that was likely to cause confusion
11 among ordinary consumers, including those who observe such product in
12 the post-sale marketplace, as to the source, sponsorship, affiliation, or
13 approval of the goods.

14 See Ninth Circuit Manual of Model Civil Jury Instructions 15.6; *AOP Ventures, Inc. v.*
15 *Steam Distribution, LLC*, 2016 WL 7336730, at *4 (C.D. Cal. Oct. 11, 2016) (citing
16 *Phillip Morris USA Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1072 (C.D. Cal. 2004));
17 *Karl Storz Endoscopy Am., Inc. v. Surgical Tech., Inc.*, 285 F.3d 848, 854 (9th Cir.
18 2002) (“The law in the Ninth Circuit is clear that ‘post-purchase’ confusion, *i.e.*,
19 confusion on the part of someone other than the purchaser who, for example, simply
20 sees the item after it has been purchased, can establish the required likelihood of
21 confusion”).

22 C. Elements Required to Establish Plaintiffs’ False Designation of Origin
23 and Unfair Competition Claim Under 15 U.S.C. § 1125(a)

24 The following elements are required to establish Plaintiffs’ claim for false
25 designation of origin under the Lanham Act:

- 26 1. Plaintiffs own valid and protectable interests in the MISS ME and/or
27 ROCK REVIVAL marks; and

2. Defendants used Plaintiffs' MISS ME and/or ROCK REVIVAL marks without consent, and in a manner that was likely to cause confusion among ordinary consumers, including those who observe such product in the post-sale marketplace, as to the source, sponsorship, affiliation, or approval of the goods.

See Ninth Circuit Manual of Model Civil Jury Instructions 15.5 cmt & 15.6; *New W. Corp. v. NYM Co. of California*, 595 F.2d 1194, 1201 (9th Cir. 1979); *AOP Ventures, Inc.*, 2016 WL 7336730, at *4 (citing *Phillip Morris USA Inc.*, 352 F. Supp. 2d at 1072); *Fed'n of Telugu Ass'ns of S. California v. Telugu Ass'n of S. California*, 2016 WL 1588479, at *8 (C.D. Cal. Apr. 20, 2016); *Karl Storz Endoscopy Am., Inc.*, 285 F.3d at 854 ("The law in the Ninth Circuit is clear that 'post-purchase' confusion, *i.e.*, confusion on the part of someone other than the purchaser who, for example, simply sees the item after it has been purchased, can establish the required likelihood of confusion").

D. Elements Required to Establish Plaintiffs' Unfair Competition Claim Under Cal. Bus. & Prof. Code §§ 17200 et seq.

The following elements are required to establish Plaintiffs' claim for unfair competition under California law:

1. Plaintiffs own valid and protectable interests in the MISS ME and/or ROCK REVIVAL marks; and
2. Defendants used Plaintiffs' MISS ME and/or ROCK REVIVAL marks without consent, and in a manner that was likely to cause confusion among ordinary consumers, including those who observe such product in the post-sale marketplace, as to the source, sponsorship, affiliation, or approval of the goods.

See Ninth Circuit Manual of Model Civil Jury Instructions 15.6; *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1457 (9th Cir. 1991); *AOP Ventures, Inc.*, 2016 WL 7336730, at *4 (citing *Phillip Morris USA Inc.*,

352 F. Supp. 2d at 1072); *Fed’n of Telugu Ass’ns of S. California v. Telugu Ass’n of S. California*, 2016 WL 1588479, at *8 (C.D. Cal. Apr. 20, 2016); *Karl Storz Endoscopy Am., Inc.*, 285 F.3d at 854 (“The law in the Ninth Circuit is clear that ‘post-purchase’ confusion, *i.e.*, confusion on the part of someone other than the purchaser who, for example, simply sees the item after it has been purchased, can establish the required likelihood of confusion”).

E. Elements Required to Establish Plaintiffs’ Trademark Dilution Claim Under Cal. Bus. & Prof. Code § 14247

The following elements are required to establish Plaintiffs’ claim for trademark dilution under California law:

1. Plaintiffs’ MISS ME and/or ROCK REVIVAL marks are famous and distinctive in the State of California;
2. Defendants are using identical or nearly identical marks in commerce;
3. Defendants’ use began after the marks became famous; and
4. Defendants’ use is likely to cause dilution of Plaintiffs’ marks, such as by (a) blurring or (b) tarnishment.

See Visa Int’l Serv. Ass’n v. JSL Corp., 610 F.3d 1088, 1089–90 (9th Cir. 2010); *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2008); *Lions Gate Entm’t Inc. v. TD Ameritrade Holding Corp.*, 2016 WL 4134495 (C.D. Cal. Aug. 1, 2016).

F. Elements Required to Establish Plaintiffs’ Trademark Infringement and Unfair Competition Claim Under California Common Law

The following elements are required to establish Plaintiffs’ claim for trademark infringement or unfair competition under California common law:

1. Plaintiffs own valid and protectable interests in the MISS ME and/or ROCK REVIVAL marks; and
2. Defendants used Plaintiffs’ MISS ME and/or ROCK REVIVAL marks without consent, and in a manner that was likely to cause confusion among ordinary consumers, including those who observe such product in

the post-sale marketplace, as to the source, sponsorship, affiliation, or approval of the goods.

See Ninth Circuit Manual of Model Civil Jury Instructions 15.6; *KCI Newport, Inc. v. Smoke Tokes, LLC*, 2016 WL 2885859, at *7 (C.D. Cal. May 17, 2016); *Kleven v. Hereford*, 2016 WL 4424964, at *7 (C.D. Cal. Feb. 18, 2016); *AOP Ventures, Inc.*, 2016 WL 7336730, at *4 (citing *Phillip Morris USA Inc.*, 352 F. Supp. 2d at 1072); *Fed’n of Telugu Ass’ns of S. California v. Telugu Ass’n of S. California*, 2016 WL 1588479, at *8 (C.D. Cal. Apr. 20, 2016); *Karl Storz Endoscopy Am., Inc.*, 285 F.3d at 854 (“The law in the Ninth Circuit is clear that ‘post-purchase’ confusion, *i.e.*, confusion on the part of someone other than the purchaser who, for example, simply sees the item after it has been purchased, can establish the required likelihood of confusion”).

III. Key Evidence in Support of Plaintiffs’ Claims

A. Key Evidence in Support of Plaintiffs’ Breach of Contract Claim

The following is a brief description of the key evidence Plaintiffs intend to rely on in support of this claim:

1. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs’ second-quality goods.
2. Testimony and/or documents demonstrating that Matt Graham was the Plant Manager and General Manager for Phoenix Fibers.
3. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

- 1 4. Testimony and/or documents demonstrating that Mr. Graham repeatedly
- 2 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
- 3 them into shoddy fiber.
- 4 5. Testimony and/or documents regarding Plaintiffs' discovery that second-
- 5 quality goods sent to Phoenix Fibers were being offered for sale in
- 6 secondary consumer trade channels.
- 7 6. Testimony and/or documents demonstrating that Phoenix Fibers'
- 8 representatives intentionally and repeatedly lied to Plaintiffs, claiming
- 9 that any second-quality goods of Plaintiffs that were being sold in the
- 10 secondary consumer market was the result of "leakage" — *i.e.*, theft —
- 11 from Phoenix Fibers' warehouse.
- 12 7. Testimony and/or documents regarding Phoenix Fibers' sale of Plaintiffs'
- 13 second-quality goods to U.S. General.
- 14 8. Testimony and/or documents regarding U.S. General's sale of Plaintiffs'
- 15 second-quality goods to SAC International Traders, Inc. ("SAC
- 16 International"), who in turn sold such goods to consumers and/or to the
- 17 other Defendants, who in turn sold them to consumers.
- 18 9. Testimony and/or documents demonstrating that Plaintiffs spent nearly
- 19 \$200,000 in order to recover certain of their second-quality goods that
- 20 were improperly sold into the secondary consumer market by Phoenix
- 21 Fibers and the other Defendants.
- 22 10. Samples of Plaintiffs' second-quality goods that Defendants sold into the
- 23 secondary consumer market.

24 B. Key Evidence in Support of Plaintiffs' Trademark Infringement Claim

25 Under 15 U.S.C. § 1114

26 The following is a brief description of the key evidence Plaintiffs intend to rely

27 on in support of this claim:

1. Plaintiffs' trademark registrations and Trademark Office file wrappers for their MISS ME and ROCK REVIVAL trademarks.
2. Testimony and/or documents regarding Plaintiffs' use of their MISS ME and ROCK REVIVAL trademarks.
3. Testimony and/or documents regarding the likelihood of confusion, including confusion among post-sale observers, arising from Defendants' offer for sale and sale of Plaintiffs' second-quality goods.
4. Testimony and/or documents regarding the strength of Plaintiffs' MISS ME and ROCK REVIVAL trademarks.
5. Testimony and/or documents regarding the types of Plaintiffs' goods that bear the MISS ME and ROCK REVIVAL trademarks, and the degree of care likely to be exercised by the post-sale observer.
6. Testimony and/or documents regarding the channels through which Plaintiffs sell their goods that bear the MISS ME and ROCK REVIVAL trademarks.
7. Testimony and/or documents regarding Defendants' bad faith and willfulness in offering for sale and selling Plaintiffs' second-quality goods into the secondary consumer marketplace.
8. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs' second-quality goods.
9. Testimony and/or documents demonstrating that Matt Graham was the Plant Manager and General Manager for Phoenix Fibers.
10. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods

1 and convert them into shoddy fiber for use in creating end products such
2 as insulation.

3 11. Testimony and/or documents demonstrating that Mr. Graham repeatedly
4 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
5 them into shoddy fiber.

6 12. Testimony and/or documents regarding Plaintiffs' discovery that second-
7 quality goods sent to Phoenix Fibers were being offered for sale in
8 secondary consumer trade channels.

9 13. Testimony and/or documents demonstrating that Phoenix Fibers'
10 representatives intentionally and repeatedly lied to Plaintiffs, claiming
11 that any second-quality goods of Plaintiffs that were being sold in the
12 secondary consumer market was the result of "leakage" — *i.e.*, theft —
13 from Phoenix Fibers' warehouse.

14 14. Testimony and/or documents regarding Phoenix Fibers' sale of Plaintiffs'
15 second-quality goods to Defendant U.S. General Export.

16 15. Testimony and/or documents regarding U.S. General Export's sale of
17 Plaintiffs' second-quality goods to SAC International Traders, Inc., who
18 in turn sold such goods to consumers, and/or to the other Defendants, who
19 in turn sold them to consumers.

20 16. Testimony and/or documents demonstrating that Plaintiffs spent nearly
21 \$200,000 in order to recover certain of their second-quality goods that
22 were improperly sold into the secondary consumer market by Phoenix
23 Fibers and the other Defendants.

24 17. Samples of Plaintiffs' second-quality goods that Defendants sold into the
25 secondary consumer market.
26
27
28

C. Key Evidence in Support of Plaintiffs' False Designation of Origin and Unfair Competition Claim Under 15 U.S.C. § 1125(a)

The following is a brief description of the key evidence Plaintiffs intend to rely on in support of this claim:

1. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs' second-quality goods.
2. Testimony and/or documents demonstrating that Matt Graham was the Plant Manager and General Manager for Phoenix Fibers.
3. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
4. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
5. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
6. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs that were being sold in the secondary consumer market was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
7. Testimony and/or documents regarding Phoenix Fibers' sale of Plaintiffs' second-quality goods to U.S. General.

- 1 8. Testimony and/or documents regarding U.S. General's sale of Plaintiffs'
2 second-quality goods to SAC International, who in turn sold such goods
3 to consumers, and/or to the other Defendants, who in turn sold them to
4 consumers.
- 5 9. Testimony and/or documents demonstrating that Plaintiffs spent nearly
6 \$200,000 in order to recover certain of their second-quality goods that
7 were improperly sold into the secondary consumer market by Phoenix
8 Fibers and the other Defendants.
- 9 10. Samples of Plaintiffs' second-quality goods that Defendants sold into the
10 secondary consumer market.
- 11 11. Plaintiffs' trademark registrations and Trademark Office file wrappers for
12 their MISS ME and ROCK REVIVAL trademarks.
- 13 12. Testimony and/or documents regarding Plaintiffs' use of their MISS ME
14 and ROCK REVIVAL trademarks.
- 15 13. Testimony and/or documents regarding the likelihood of confusion,
16 including confusion among post-sale observers, arising from Defendants'
17 offer for sale and sale of Plaintiffs' second-quality goods.
- 18 14. Testimony and/or documents regarding the strength of Plaintiffs' MISS
19 ME and ROCK REVIVAL trademarks.
- 20 15. Testimony and/or documents regarding the types of Plaintiffs' goods that
21 bear the MISS ME and ROCK REVIVAL trademarks, and the degree of
22 care likely to be exercised by the post-sale observer.
- 23 16. Testimony and/or documents regarding the channels through which
24 Plaintiffs sell their goods that bear the MISS ME and ROCK REVIVAL
25 trademarks.
- 26 17. Testimony and/or documents regarding Defendants' bad faith and
27 willfulness in offering for sale and selling Plaintiffs' second-quality goods
28 into the secondary consumer marketplace.

D. Key Evidence in Support of Plaintiffs' Unfair Competition Claim Under Cal. Bus. & Prof. Code §§ 17200 et seq.

The following is a brief description of the key evidence Plaintiffs intend to rely on in support of this claim:

1. Plaintiffs' trademark registrations and Trademark Office file wrappers for their MISS ME and ROCK REVIVAL trademarks.
2. Testimony and/or documents regarding Plaintiffs' use of their MISS ME and ROCK REVIVAL trademarks.
3. Testimony and/or documents regarding the likelihood of confusion, including confusion among post-sale observers, arising from Defendants' offer for sale and sale of Plaintiffs' second-quality goods.
4. Testimony and/or documents regarding the strength of Plaintiffs' MISS ME and ROCK REVIVAL trademarks.
5. Testimony and/or documents regarding the types of Plaintiffs' goods that bear the MISS ME and ROCK REVIVAL trademarks, and the degree of care likely to be exercised by the post-sale observer.
6. Testimony and/or documents regarding the channels through which Plaintiffs sell their goods that bear the MISS ME and ROCK REVIVAL trademarks.
7. Testimony and/or documents regarding Defendants' bad faith and willfulness in offering for sale and selling Plaintiffs' second-quality goods into the secondary consumer marketplace.
8. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs' second-quality goods.
9. Testimony and/or documents demonstrating that Matt Graham was the Plant Manager and General Manager for Phoenix Fibers.

- 1 10. Testimony and/or documents demonstrating that Ms. Song (on behalf of
2 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
3 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
4 charge, in exchange for which Phoenix Fibers would shred those goods
5 and convert them into shoddy fiber for use in creating end products such
6 as insulation.
- 7 11. Testimony and/or documents demonstrating that Mr. Graham repeatedly
8 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
9 them into shoddy fiber.
- 10 12. Testimony and/or documents regarding Plaintiffs' discovery that second-
11 quality goods sent to Phoenix Fibers were being offered for sale in
12 secondary consumer trade channels.
- 13 13. Testimony and/or documents demonstrating that Phoenix Fibers'
14 representatives intentionally and repeatedly lied to Plaintiffs, claiming
15 that any second-quality goods of Plaintiffs that were being sold in the
16 secondary consumer market was the result of "leakage" — *i.e.*, theft —
17 from Phoenix Fibers' warehouse.
- 18 14. Testimony and/or documents regarding Phoenix Fibers' sale of Plaintiffs'
19 second-quality goods to Defendant U.S. General.
- 20 15. Testimony and/or documents regarding U.S. General's sale of Plaintiffs'
21 second-quality goods to SAC International Traders, Inc., who in turn sold
22 such goods to consumers, and/or to the other Defendants, who in turn sold
23 them to consumers.
- 24 16. Testimony and/or documents demonstrating that Plaintiffs spent nearly
25 \$200,000 in order to recover certain of their second-quality goods that
26 were improperly sold into the secondary consumer market by Phoenix
27 Fibers and the other Defendants.
- 28

1 17. Samples of Plaintiffs' second-quality goods that Defendants sold into the
2 secondary consumer market.

3 E. Key Evidence in Support of Plaintiffs' Trademark Dilution Claim Under
4 Cal. Bus. & Prof. Code § 14247

5 The following is a brief description of the key evidence Plaintiffs intend to rely
6 on in support of this claim:

- 7 1. Plaintiffs' trademark registrations and Trademark Office file wrappers for
8 their MISS ME and ROCK REVIVAL trademarks.
- 9 2. Testimony and/or documents regarding Plaintiffs' use of their MISS ME
10 and ROCK REVIVAL trademarks.
- 11 3. Testimony and/or documents regarding the fame and distinctiveness of
12 Plaintiffs' MISS ME and/or ROCK REVIVAL.
- 13 4. Testimony and/or documents regarding the likelihood of dilution by
14 blurring and/or tarnishment arising from Defendants' offer for sale and
15 sale of Plaintiffs' second-quality goods.
- 16 5. Testimony and/or documents regarding the high quality of Plaintiffs'
17 goods that bear the MISS ME or ROCK REVIVAL marks, and the low
18 quality of Plaintiffs' second-quality goods sold to consumers by
19 Defendants.
- 20 6. Testimony and/or documents regarding the strength of Plaintiffs' MISS
21 ME and ROCK REVIVAL trademarks.
- 22 7. Testimony and/or documents regarding the types of Plaintiffs' goods that
23 bear the MISS ME and ROCK REVIVAL trademarks, and the degree of
24 care likely to be exercised by the post-sale observer.
- 25 8. Testimony and/or documents regarding the channels through which
26 Plaintiffs sell their goods that bear the MISS ME and ROCK REVIVAL
27 trademarks.
- 28

- 1 9. Testimony and/or documents regarding Defendants' bad faith and
2 willfulness in offering for sale and selling Plaintiffs' second-quality goods
3 into the secondary consumer marketplace.
- 4 10. Testimony and/or documents demonstrating that Lisa Song represented
5 Plaintiffs in her discussions with Matt Graham of Phoenix Fibers,
6 inquiring as to a means of destroying Plaintiffs' second-quality goods.
- 7 11. Testimony and/or documents demonstrating that Matt Graham was the
8 Plant Manager and General Manager for Phoenix Fibers.
- 9 12. Testimony and/or documents demonstrating that Ms. Song (on behalf of
10 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
11 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
12 charge, in exchange for which Phoenix Fibers would shred those goods
13 and convert them into shoddy fiber for use in creating end products such
14 as insulation.
- 15 13. Testimony and/or documents demonstrating that Mr. Graham repeatedly
16 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
17 them into shoddy fiber.
- 18 14. Testimony and/or documents regarding Plaintiffs' discovery that second-
19 quality goods sent to Phoenix Fibers were being offered for sale in
20 secondary consumer trade channels.
- 21 15. Testimony and/or documents demonstrating that Phoenix Fibers'
22 representatives intentionally and repeatedly lied to Plaintiffs, claiming
23 that any second-quality goods of Plaintiffs that were being sold in the
24 secondary consumer market was the result of "leakage" — *i.e.*, theft —
25 from Phoenix Fibers' warehouse.
- 26 16. Testimony and/or documents regarding Phoenix Fibers' sale of Plaintiffs'
27 second-quality goods to Defendant U.S. General.
- 28

1 17. Testimony and/or documents regarding U.S. General's sale of Plaintiffs'
 2 second-quality goods to SAC International Traders, Inc., who in turn sold
 3 such goods to consumers, and/or to the other Defendants, who in turn sold
 4 them to consumers.

5 18. Testimony and/or documents demonstrating that Plaintiffs spent nearly
 6 \$200,000 in order to recover certain of their second-quality goods that
 7 were improperly sold into the secondary consumer market by Phoenix
 8 Fibers and the other Defendants.

9 19. Samples of Plaintiffs' second-quality goods that Defendants sold into the
 10 secondary consumer market.

11 F. Key Evidence in Support of Plaintiffs' Trademark Infringement and
 12 Unfair Competition Claim Under California Common Law

13 The following is a brief description of the key evidence Plaintiffs intend to rely
 14 on in support of this claim:

- 15 1. Plaintiffs' trademark registrations and Trademark Office file wrappers for
 16 their MISS ME and ROCK REVIVAL trademarks.
- 17 2. Testimony and/or documents regarding Plaintiffs' use of their MISS ME
 18 and ROCK REVIVAL trademarks.
- 19 3. Testimony and/or documents regarding the likelihood of confusion,
 20 including confusion among post-sale observers, arising from Defendants'
 21 offer for sale and sale of Plaintiffs' second-quality goods.
- 22 4. Testimony and/or documents regarding the strength of Plaintiffs' MISS
 23 ME and ROCK REVIVAL trademarks.
- 24 5. Testimony and/or documents regarding the types of Plaintiffs' goods that
 25 bear the MISS ME and ROCK REVIVAL trademarks, and the degree of
 26 care likely to be exercised by the post-sale observer.

- 1 6. Testimony and/or documents regarding the channels through which
2 Plaintiffs sell their goods that bear the MISS ME and ROCK REVIVAL
3 trademarks.
- 4 7. Testimony and/or documents regarding Defendants' bad faith and
5 willfulness in offering for sale and selling Plaintiffs' second-quality goods
6 into the secondary consumer marketplace.
- 7 8. Testimony and/or documents demonstrating that Lisa Song represented
8 Plaintiffs in her discussions with Matt Graham of Phoenix Fibers,
9 inquiring as to a means of destroying Plaintiffs' second-quality goods.
- 10 9. Testimony and/or documents demonstrating that Matt Graham was the
11 Plant Manager and General Manager for Phoenix Fibers.
- 12 10. Testimony and/or documents demonstrating that Ms. Song (on behalf of
13 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
14 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
15 charge, in exchange for which Phoenix Fibers would shred those goods
16 and convert them into shoddy fiber for use in creating end products such
17 as insulation.
- 18 11. Testimony and/or documents demonstrating that Mr. Graham repeatedly
19 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
20 them into shoddy fiber.
- 21 12. Testimony and/or documents regarding Plaintiffs' discovery that second-
22 quality goods sent to Phoenix Fibers were being offered for sale in
23 secondary consumer trade channels.
- 24 13. Testimony and/or documents demonstrating that Phoenix Fibers'
25 representatives intentionally and repeatedly lied to Plaintiffs, claiming
26 that any second-quality goods of Plaintiffs that were being sold in the
27 secondary consumer market was the result of "leakage" — *i.e.*, theft —
28 from Phoenix Fibers' warehouse.

14. Testimony and/or documents regarding Phoenix Fibers’ sale of Plaintiffs’ second-quality goods to Defendant U.S. General.
15. Testimony and/or documents regarding U.S. General’s sale of Plaintiffs’ second-quality goods to SAC International Traders, Inc., who in turn sold such goods to consumers, and/or to the other Defendants, who in turn sold them to consumers.
16. Testimony and/or documents demonstrating that Plaintiffs spent nearly \$200,000 in order to recover certain of their second-quality goods that were improperly sold into the secondary consumer market by Phoenix Fibers and the other Defendants.
17. Samples of Plaintiffs’ second-quality goods that Defendants sold into the secondary consumer market.

IV. **Defendants’ Affirmative Defenses**

Phoenix Fibers’ Affirmative Defense (“Aff. Def.”) 1:¹ Phoenix Fibers alleges that Plaintiffs’ complaint fails to state a claim upon which relief may be granted. Plaintiffs understand that Phoenix Fibers is abandoning this defense.

Phoenix Fibers’ Aff. Def. 2: Phoenix Fibers alleges that Plaintiffs’ claims are barred by estoppel. Plaintiffs understand that Phoenix Fibers is abandoning this defense.

¹ Phoenix Fibers’ Answer to Plaintiffs’ Complaint asserted only five affirmative defenses. Dkt. 22. Although Plaintiffs served their First Amended Complaint on May 18, 2016 (Dkt. 32), Phoenix Fibers did not answer until three days ago, on March 3, 2017. Dkt. 105. This new answer has asserted an additional five affirmative defenses — (1) first sale doctrine; (2) statute of limitations; (3) laches; (4) mutual mistake; and (5) failure to mitigate. *Compare* Dkt. 105 *with* Dkt. 22. As indicated below, Plaintiffs anticipate moving to strike Phoenix Fibers’ belated answer once they are able to comply with the meet and confer requirements set forth in the Local Rules.

1 Phoenix Fibers’ Aff. Def. 3: Phoenix Fibers alleges that Plaintiffs’ claims are
2 barred by waiver.

3 Phoenix Fibers’ Aff. Def. 4: Phoenix Fibers alleges that Plaintiffs’ breach of
4 contract claim fails for lack of consideration.

5 Phoenix Fibers’ Aff. Def. 5: Phoenix Fibers alleges that Plaintiffs’ breach of
6 contract claim is barred due to a lack of mutuality of obligation. Plaintiffs understand
7 that Phoenix Fibers is abandoning this defense.

8 Phoenix Fibers’ Aff. Def. 6: Phoenix Fibers alleges that Plaintiffs’ claims are
9 barred by the first sale doctrine.

10 Phoenix Fibers’ Aff. Def. 7: Phoenix Fibers alleges that Plaintiffs’ claims are
11 barred by the relevant statutes of limitations.

12 Phoenix Fibers’ Aff. Def. 8: Phoenix Fibers alleges that Plaintiffs’ claims are
13 barred by the doctrine of laches.

14 Phoenix Fibers’ Aff. Def. 9: Phoenix Fibers alleges that Plaintiffs’ breach of
15 contract claim fails for mutual mistake of fact.

16 Phoenix Fibers’ Aff. Def. 10: Phoenix Fibers alleges that Plaintiffs’ claims for
17 damages are barred due to Plaintiffs’ failure to mitigate.

18 U.S. General’s Aff. Def. 1:² U.S. General alleges that Plaintiffs’ complaint
19 fails to state a claim upon which relief may be granted.

20 U.S. General’s Aff. Def. 2: U.S. General alleges that Plaintiffs have not
21 suffered any harm or monetary damage.

22 U.S. General’s Aff. Def. 3: U.S. General alleges that Plaintiffs caused their
23 own damage by their conduct, misconduct, or failure to mitigate.

24
25
26 ² U.S. General did not enumerate its affirmative defenses, but instead asserted a variety
27 of defenses over the course of several paragraphs of text. *See* Dkt. No. 46 at 11–12.
28 Plaintiffs have attempted herein to separate and enumerate U.S. General’s defenses.

1 U.S. General's Aff. Def. 4: U.S. General alleges that its conduct did not cause
2 any damage to Plaintiffs.

3 Comak's Aff. Def. 1: Comak alleges that Plaintiffs' complaint is frivolous.

4 Comak's Aff. Def. 2: Comak alleges that Plaintiffs' complaint fails to state a
5 claim upon which relief may be granted.

6 Comak's Aff. Def. 3: Comak alleges that Plaintiffs caused their own damage
7 by their conduct, misconduct, or failure to mitigate.

8 Comak's Aff. Def. 4: Comak alleges that Plaintiffs have not suffered any
9 legally cognizable damages.

10 Comak's Aff. Def. 5: Comak alleges that its conduct did cause any damage to
11 Plaintiffs.

12 Comak's Aff. Def. 6: Comak alleges that any remedies or relief are limited by
13 the limitation of remedies and liability.

14 Comak's Aff. Def. 7: Comak reserves the right to raise additional defenses.

15 Defendant Tiffany Alana Wolff d/b/a Miss V Lane ("Wolff")'s Aff. Def. 1:
16 Wolff alleges that Plaintiffs' complaint fails to state a claim upon which relief may be
17 granted.

18 Wolff's Aff. Def. 2: Wolff alleges that Plaintiffs' claims are barred by the
19 relevant statutes of limitations.

20 Wolff's Aff. Def. 3: Wolff alleges that Plaintiffs are barred from recovering
21 damages by their failure to mitigate.

22 Wolff's Aff. Def. 4: Wolff alleges that Plaintiff's claims are barred by waiver.

23 Wolff's Aff. Def. 5: Wolff alleges that Plaintiffs' claims are barred by
24 estoppel.

25 Wolff's Aff. Def. 6: Wolff alleges that Plaintiffs' claims are barred by the
26 doctrine of unclean hands.

27 Wolff's Aff. Def. 7: Wolff alleges that Plaintiffs' claims are barred by the
28 doctrine of laches.

1 Wolff's Aff. Def. 8: Wolff alleges that her conduct did cause any damage to
2 Plaintiffs.

3 Wolff's Aff. Def. 9: Wolff alleges that Plaintiffs assumed the risk as it relates
4 to their action.

5 Wolff's Aff. Def. 10: Wolff alleges that her conduct did cause any damage to
6 Plaintiffs.

7 Wolff's Aff. Def. 11: Wolff reserves the right to raise additional defenses.

8 Defendants Lydia Evilsa Terrazas Cho and Myung Kwon Cho (jointly, "Cho")
9 Aff. Def. 1: Cho alleges that Plaintiffs' complaint is frivolous.

10 Cho's Aff. Def. 2: Cho alleges that Plaintiffs' complaint fails to state a claim
11 upon which relief may be granted.

12 Cho's Aff. Def. 3: Cho alleges that Plaintiffs caused their own damage by their
13 conduct, misconduct, or failure to mitigate.

14 Cho's Aff. Def. 4: Cho alleges that Plaintiffs have not suffered any legally
15 cognizable damages.

16 Cho's Aff. Def. 5: Cho alleges that her conduct did not cause any damage to
17 Plaintiffs.

18 Cho's Aff. Def. 6: Cho alleges that any remedies or relief are limited by the
19 limitation of remedies and liability.

20 Cho's Aff. Def. 7: Cho reserves the right to raise additional defenses.

21 **V. Elements Required to Establish Defendants' Affirmative Defenses**

22 **A. Phoenix Fibers' Aff. Def. 1 — Failure to State a Claim**

23 Plaintiffs understand that Phoenix Fibers is abandoning this defense.
24 Moreover, this is not an affirmative defense, but rather a denial that Plaintiffs have
25 adequately pleaded the elements of their claims. *See Vogel v. Huntington Oaks*
26 *Delaware Partners, LLC*, 291 F.R.D. 438, 442 (C.D. Cal. 2013); *Quintana v. Baca*,
27 233 F.R.D. 562, 564 (C.D. Cal. 2005).

1 B. Phoenix Fibers’ Aff. Def. 2 — Estoppel

2 Plaintiffs understand that Phoenix Fibers is abandoning this defense. To the
3 extent it is maintained, however, in order to establish this defense, Phoenix Fibers
4 must prove that:

- 5 1. Plaintiffs knew that Phoenix Fibers was selling Plaintiffs’ second-quality
6 goods;
- 7 2. Plaintiffs intended that Phoenix Fibers would believe that Plaintiffs did
8 not intend to enforce their rights against Phoenix Fibers, or that Phoenix
9 Fibers had a right to believe that Plaintiffs so intended;
- 10 3. Phoenix Fibers did not know the Plaintiffs actually objected to the sale of
11 Plaintiffs’ second-quality goods; and
- 12 4. Due to its reliance on the Plaintiffs’ actions, Phoenix Fibers will be
13 materially prejudiced if Plaintiffs are allowed to proceed with their
14 claims.

15 *In re Associated Vintage Grp., Inc.*, 283 B.R. 549, 567 (B.A.P. 9th Cir. 2002) (listing
16 the basic elements of equitable estoppel); *AirWair Int’l Ltd. v. Schultz*, 84 F. Supp. 3d
17 943, 958 (N.D. Cal. 2015) (addressing trademark infringement specifically).

18 C. Phoenix Fibers’ Aff. Def. 3 — Waiver

19 In order to establish this defense, Phoenix Fibers must prove that:

- 20 1. Plaintiffs intentionally relinquished their known right to bring their claims
21 with knowledge of the claims’ existence; and
- 22 2. Plaintiffs had the intent to relinquish the right.

23 *See United States v. King Features Entm’t, Inc.*, 843 F.2d 394, 399 (9th Cir. 1988).

24 D. Phoenix Fibers’ Aff. Def. 4 — Lack of Consideration

25 In order to establish this defense, Phoenix Fibers must prove that the parties
26 did not exchange good consideration, defined by California law as “[a]ny benefit
27 conferred, or agreed to be conferred, upon the promisor, by any other person, to
28 which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be

suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.” Cal. Civ. Code § 1605 (West); *see also* Cal. Civ. Code § 1615 (West) (party claiming lack of consideration bears the burden of proof).

E. Phoenix Fibers’ Aff. Def. 5 — Lack of Mutuality of Obligation

Plaintiffs understand that Phoenix Fibers is abandoning this defense. Moreover, this defense is duplicative of Phoenix Fibers’ defense regarding lack of consideration. *See Mattei v. Hopper*, 330 P.2d 625, 626 (Cal. 1958) (“Without this mutuality of obligation, the agreement lacks consideration and no enforceable contract has been created.”); *Fireman’s Fund Ins. Co. v. Sizzler USA Real Prop., Inc.*, 169 Cal. App. 4th 415, 421 (Cal. Ct. App. 2008) (“The consideration for the leases, including all of their covenants, comprised the mutual promises of the parties, as a whole.”); *see also* Restatement (2d) of Contracts § 79 (1981) (“If the requirement of consideration is met, there is no additional requirement of ... ‘mutuality of obligation.’”).

F. Phoenix Fibers’ Aff. Def. 6 — First Sale Doctrine

In order to establish this defense, Phoenix Fibers must prove that:

1. Plaintiffs authorized a first sale of its second-quality denim products; and
2. Plaintiffs’ second-quality denim products were not materially different from Plaintiffs’ first-quality denim products.

See Enesco Corp. v. Price/Costco Inc., 146 F.3d 1083, 1085–87 (9th Cir. 1998); *Microban Prod. Co. v. API Indus., Inc.*, 2014 WL 1856471, at **9–10 (S.D.N.Y. May 8, 2014).

G. Phoenix Fibers’ Aff. Def. 7 — Statute of Limitations

In order to establish this defense, Phoenix Fibers must prove that Plaintiffs’ claimed harm accrued before February 10, 2012. *See* Cal. Code Civ. Proc. § 343 (providing for a four-year statute of limitations for state claims, where not otherwise

provided for); *AirWair Int'l Ltd.*, 84 F. Supp. 3d at 959 (four-year statutes of limitation govern Lanham Act claims, state trademark claims, state unfair competition claims, and common law unfair competition claims); *DC Comics v. Towle*, 989 F. Supp. 2d 948, 971 (C.D. Cal. 2013) (“As trademark infringement is a “continuing” wrong, the statute of limitations bars only monetary relief for the period outside the statute of limitations.... However, Plaintiff is free to pursue monetary and equitable relief for the time within the limitations period.” (citing *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 837 (9th Cir. 2002)), *aff'd*, 802 F.3d 1012 (9th Cir. 2015).

H. Phoenix Fibers’ Aff. Def. 8 — Laches

In order to establish this defense, Phoenix Fibers must prove that:

1. Plaintiffs unreasonably delayed in asserting their claims; and
2. Plaintiffs’ delay prejudiced Phoenix Fibers.

See Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1083 (9th Cir. 2000).

I. Phoenix Fibers’ Aff. Def. 9 — Mutual Mistake

In order to establish this defense, Phoenix Fibers must prove that:

1. Both parties made a material mistake of fact or law in entering into the agreement; and
2. Phoenix Fibers would not have agreed to enter into this contract if it had known about the mistake.

See CACI No. 331 (Affirmative Defense—Bilateral Mistake); Cal. Civ. Code §§ 1576–78, 1689(b)(1).

J. Phoenix Fibers’ Aff. Def. 10 — Failure to Mitigate

In order to establish this defense, Phoenix Fibers must prove that:

1. Plaintiffs’ damages could have been avoided; and
2. Plaintiffs failed to take reasonable steps to avoid the damage.

1 *See Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978); *Steelduct Co.*
 2 *v. Henger-Seltzer Co.*, 160 P.2d 804, 812 (Cal. 1945) (“Plaintiff cannot recover for loss
 3 which by reasonable means it could have avoided”).

4 K. U.S. General’s Aff. Def. 1 — Failure to State a Claim

5 This is not an affirmative defense, but rather a denial that Plaintiffs have
 6 adequately pleaded the elements of their claims. *See Vogel*, 291 F.R.D. at 442;
 7 *Quintana*, 233 F.R.D. at 564.

8 L. U.S. General’s Aff. Def. 2 — No Injury

9 This is not an affirmative defense, but rather a denial that Plaintiffs have
 10 adequately pleaded the elements of their claims. *See J&J Sports Prods., Inc. v.*
 11 *Juarez*, 2016 WL 795891, at *1 (S.D. Cal. Mar. 1, 2016) (finding that “lack of ...
 12 damages” is “not [an] affirmative defense” but rather “merely den[ies] elements of”
 13 the claims); *Vogel*, 291 F.R.D. at 442 (defense “alleging ‘no damage or injury’ is also
 14 not an affirmative defense”); *Hernandez v. Dutch Goose, Inc.*, 2013 WL 5781476, at
 15 *7 (N.D. Cal. Oct. 25, 2013) (dismissing “defenses” of “lack of standing” and that
 16 “Plaintiff suffered no injury” because they “are not actually affirmative defenses at
 17 all”).

18 M. U.S. General’s Aff. Def. 3 — Failure to Mitigate

19 In order to establish this defense, U.S. General must prove that:

- 20 1. Plaintiffs’ damages could have been avoided; and
- 21 2. Plaintiffs failed to take reasonable steps to avoid the damage.

22 *See Sias*, 588 F.2d at 696; *Steelduct Co.*, 160 P.2d at 812 (“Plaintiff cannot recover for
 23 loss which by reasonable means it could have avoided”).

24 N. U.S. General’s Aff. Def. 4 — Lack of Causation

25 U.S. General attempts to assert the defense that its actions were not the
 26 proximate cause of Plaintiffs’ injuries. This is not a valid defense, but merely denies
 27 an element of Plaintiffs’ claims. *See J&J Sports Prods., Inc.*, 2016 WL 795891, at *1
 28

(finding that “lack of causation” is “not [an] affirmative defense” but rather “merely den[ies] elements of” the claims).

O. Comak’s Aff. Def. 1 — Frivolous Complaint

This is not a valid affirmative defense, as it does not attempt to excuse conduct alleged in the First Amended Complaint. *See Hirananeck v. Clark*, 2015 WL 693222, at *3 (N.D. Cal. Feb. 18, 2015) (citing *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir. 2002)); *Thornton v. Solutionone Cleaning Concepts, Inc.*, 2007 WL 210586, at *4 (E.D. Cal. Jan. 26, 2007); *see also City and Cnty. of San Francisco v. Kihagi*, 2016 WL 7174532, at *2 (Cal. Super. Nov. 14, 2016) (frivolity is not a proper affirmative defense).

P. Comak’s Aff. Def. 2 — Failure to State a Claim

This is not an affirmative defense, but rather a denial that Plaintiffs have adequately pleaded the elements of their claims. *See Vogel*, 291 F.R.D. at 442; *Quintana*, 233 F.R.D. at 564.

Q. Comak’s Aff. Def. 3 — Failure to Mitigate

In order to establish this defense, Comak must prove that:

1. Plaintiffs’ damages could have been avoided; and
2. Plaintiffs failed to take reasonable steps to avoid the damage.

See Sias, 588 F.2d at 696; *Steelduct Co.*, 160 P.2d at 812 (“Plaintiff cannot recover for loss which by reasonable means it could have avoided”).

R. Comak’s Aff. Def. 4 — No Injury

This is not an affirmative defense, but rather a denial that Plaintiffs have adequately pleaded the elements of their claims. *See J&J Sports Prods., Inc.*, 2016 WL 795891, at *1 (finding that “lack of ... damages” is “not [an] affirmative defense” but rather “merely den[ies] elements of” the claims); *Vogel*, 291 F.R.D. at 442 (defense “alleging ‘no damage or injury’ is also not an affirmative defense”); *Hernandez*, 2013 WL 5781476, at *7 (dismissing “defenses” of “lack of standing”

1 and that “Plaintiff suffered no injury” because they “are not actually affirmative
2 defenses at all”).

3 S. Comak’s Aff. Def. 5 — Lack of Causation

4 Comak attempts to assert the defense that its actions were not the proximate
5 cause of Plaintiffs’ injuries. This is not a valid defense, but merely denies an element
6 of Plaintiffs’ claims. *See J&J Sports Prods., Inc.*, 2016 WL 795891, at *1 (finding
7 that “lack of causation” is “not [an] affirmative defense” but rather “merely den[ies]
8 elements of” the claims).

9 T. Comak’s Aff. Def. 6 — Limitation of Remedies and Liability

10 This defense is incomprehensible, and therefore not a valid defense. To the
11 extent that Comak intends to refer to a contractual limitation of remedies, that “is not
12 an affirmative defense.” *Flagship W., LLC v. Excel Realty Partners LP*, 337 F. App’x
13 679, 681 (9th Cir. 2009).

14 U. Comak’s Aff. Def. 7 — Reservation of Rights

15 This is not an affirmative defense, but simply a reservation of “the right to assert
16 unspecified defenses later.” *Vogel*, 291 F.R.D. at 442 (“This is not a defense at all,
17 affirmative or otherwise.”).

18 V. Wolff’s Aff. Def. 1 — Failure to State a Claim

19 This is not an affirmative defense, but rather a denial that Plaintiffs have
20 adequately pleaded the elements of their claims. *See Vogel*, 291 F.R.D. at 442;
21 *Quintana*, 233 F.R.D. at 564.

22 W. Wolff’s Aff. Def. 2 — Statute of Limitations

23 In order to establish this defense, Wolff must prove that Plaintiffs’ claimed
24 harm accrued before February 10, 2012. *See Cal. Code Civ. Proc. § 343* (providing
25 for a four-year statute of limitations for state claims, where not otherwise provided
26 for); *AirWair Int’l Ltd.*, 84 F. Supp. 3d at 959 (four-year statutes of limitation govern
27 Lanham Act claims, state trademark claims, state unfair competition claims, and
28 common law unfair competition claims); *DC Comics v. Towle*, 989 F. Supp. 2d at

971 (“As trademark infringement is a “continuing” wrong, the statute of limitations bars only monetary relief for the period outside the statute of limitations.... However, Plaintiff is free to pursue monetary and equitable relief for the time within the limitations period.” (citing *Jarrow Formulas, Inc.*, 304 F.3d at 837), *aff’d*, 802 F.3d 1012 (9th Cir. 2015).

X. Wolff’s Aff. Def. 3 — Failure to Mitigate

In order to establish this defense, Wolff must prove that:

1. Plaintiffs’ damages could have been avoided; and
2. Plaintiffs failed to take reasonable steps to avoid the damage.

See Sias, 588 F.2d at 696; *Steelduct Co.*, 160 P.2d at 812 (“Plaintiff cannot recover for loss which by reasonable means it could have avoided”).

Y. Wolff’s Aff. Def. 4 — Waiver

In order to establish this defense, Wolff must prove that:

1. Plaintiffs intentionally relinquished their known right to bring their claims with knowledge of the claims’ existence; and
2. Plaintiffs had the intent to relinquish the right.

See King Features Entm’t, Inc., 843 F.2d at 399.

Z. Wolff’s Aff. Def. 5 — Estoppel

In order to establish this defense, Wolff must prove that:

1. Plaintiffs knew that Wolff was selling Plaintiffs’ second-quality goods;
2. Plaintiffs intended that Wolff would believe that Plaintiffs did not intend to enforce their rights against Wolff, or that Wolff had a right to believe that Plaintiffs so intended;
3. Wolff did not know that Plaintiffs actually objected to the sale of Plaintiffs’ second-quality goods; and
4. Due to her reliance on the Plaintiffs’ actions, Wolff will be materially prejudiced if Plaintiffs are allowed to proceed with their claims.

1 *In re Associated Vintage Grp., Inc.*, 283 B.R. at 567 (listing the basic elements of
 2 equitable estoppel); *AirWair Int'l Ltd.*, 84 F. Supp. 3d at 958 (addressing trademark
 3 infringement specifically).

4 AA. Wolff's Aff. Def. 6 — Unclean Hands

5 In order to establish this defense, Wolff must prove that:

- 6 1. Plaintiffs engaged in inequitable conduct;
- 7 2. Plaintiffs' conduct directly relates to the claims they have asserted against
- 8 Wolff; and
- 9 3. Plaintiffs' conduct injured Wolff.

10 *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1223
 11 (C.D. Cal. 2007).

12 BB. Wolff's Aff. Def. 7 — Laches

13 In order to establish this defense, Wolff must prove that:

- 14 1. Plaintiffs unreasonably delayed in asserting their claims; and
- 15 2. Plaintiffs' delay prejudiced Wolff.

16 *See Couveau*, 218 F.3d at 1083.

17 CC. Wolff's Aff. Def. 8 — Lack of Causation

18 Wolff attempts to assert the defense that its actions were not the proximate
 19 cause of Plaintiffs' injuries. This is not a valid defense, but merely denies an element
 20 of Plaintiffs' claims. *See J&J Sports Prods., Inc.*, 2016 WL 795891, at *1 (finding
 21 that "lack of causation" is "not [an] affirmative defense" but rather "merely den[ies]
 22 elements of" the claims).

23 DD. Wolff's Aff. Def. 9 — Assumption of Risk

24 This defense is inapplicable to this case, since it is based on a theory of
 25 contributory negligence, even though no claims of negligence have been pleaded.
 26 *See generally* 2 Cal. Affirmative Def. § 48:24 (2d ed.); *see also Curry*, 367 F.2d at
 27 928 ("The general rule is that contributory negligence is a defense only to actions
 28 grounded on negligence....").

1 EE. Wolff’s Aff. Def. 10 — Lack of Causation

2 This defense (like Wolff’s eighth affirmative defense) asserts that Wolff’s
3 actions were not the proximate cause for Plaintiffs’ injuries. This is not a valid
4 defense, but merely denies an element of Plaintiffs’ claims. *See J&J Sports Prods.,*
5 *Inc.*, 2016 WL 795891, at *1 (finding that “lack of causation” is “not [an] affirmative
6 defense” but rather “merely den[ies] elements of” the claims).

7 FF. Wolff’s Aff. Def. 11 — Reservation of Rights

8 This is not an affirmative defense, but simply a reservation of “the right to assert
9 unspecified defenses later.” *Vogel*, 291 F.R.D. at 442 (“This is not a defense at all,
10 affirmative or otherwise.”).

11 GG. Cho’s Aff. Def. 1 — Frivolous Complaint

12 This is not a valid affirmative defense, as it does not attempt to excuse conduct
13 alleged in the First Amended Complaint. *See Hiranamek*, 2015 WL 693222, at *3
14 (citing *Zivkovic*, 302 F.3d at 1088); *Thornton*, 2007 WL 210586, at *4; *see also City*
15 *and Cnty. of San Francisco*, 2016 WL 7174532, at *2 (frivolity is not a proper
16 affirmative defense).

17 HH. Cho’s Aff. Def. 2 — Failure to State a Claim

18 This is not an affirmative defense, but rather a denial that Plaintiffs have
19 adequately pleaded the elements of their claims. *See Vogel*, 291 F.R.D. at 442;
20 *Quintana*, 233 F.R.D. at 564.

21 II. Cho’s Aff. Def. 3 — Failure to Mitigate

22 In order to establish this defense, Cho must prove that:

- 23 1. Plaintiffs’ damages could have been avoided; and
- 24 2. Plaintiffs failed to take reasonable steps to avoid the damage.

25 *See Sias*, 588 F.2d at 696; *Steelduct Co.*, 160 P.2d at 812 (“Plaintiff cannot recover for
26 loss which by reasonable means it could have avoided”).

1 JJ. Cho's Aff. Def. 4 — No Injury

2 This is not an affirmative defense, but rather a denial that Plaintiffs have
 3 adequately pleaded the elements of their claims. *See J&J Sports Prods., Inc.*, 2016
 4 WL 795891, at *1 (finding that “lack of ... damages” is “not [an] affirmative
 5 defense” but rather “merely den[ies] elements of” the claims); *Vogel*, 291 F.R.D. at
 6 442 (defense “alleging ‘no damage or injury’ is also not an affirmative defense”);
 7 *Hernandez*, 2013 WL 5781476, at *7 (dismissing “defenses” of “lack of standing”
 8 and that “Plaintiff suffered no injury” because they “are not actually affirmative
 9 defenses at all”).

10 KK. Cho's Aff. Def. 5 — Lack of Causation

11 Cho attempts to assert the defense that its actions were not the proximate cause
 12 of Plaintiffs' injuries. This is not a valid defense, but merely denies an element of
 13 Plaintiffs' claims. *See J&J Sports Prods., Inc.*, 2016 WL 795891, at *1 (finding that
 14 “lack of causation” is “not [an] affirmative defense” but rather “merely den[ies]
 15 elements of” the claims).

16 LL. Cho's Aff. Def. 6 — Limitation of Remedies and Liability

17 This defense is incomprehensible, and therefore not a valid defense. To the
 18 extent that Cho intends to refer to a contractual limitation of remedies, that also “is
 19 not an affirmative defense.” *Flagship W., LLC*, 337 F. App'x at 681.

20 MM. Cho's Aff. Def. 7 — Reservation of Rights

21 This is not an affirmative defense, but simply a reservation of “the right to
 22 assert unspecified defenses later.” *Vogel*, 291 F.R.D. at 442 (“This is not a defense at
 23 all, affirmative or otherwise.”).

24 **VI. Key Evidence in Opposition to Defendants' Affirmative Defenses**

25 A. Improper Defenses

26 No evidence is necessary to oppose the following “defenses,” since, as set
 27 forth above, they are not proper affirmative defenses: Phoenix Fibers' first
 28 affirmative defense; U.S. General's first, second, and fourth affirmative defenses;

Comak's first, second, fourth, fifth, sixth, and seventh affirmative defenses; Wolff's first, eighth, ninth, tenth, and eleventh affirmative defenses; and Cho's first, second, fourth, fifth, sixth, and seventh affirmative defenses.

B. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 2 — Estoppel

Plaintiffs understand that Phoenix Fibers is abandoning this defense. To the extent it is maintained, however, the following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Plaintiffs knew that Phoenix Fibers was selling Plaintiffs' second-quality goods

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming

1 that any second-quality goods of Plaintiffs' that were being sold in
 2 secondary channels was the result of "leakage" — *i.e.*, theft — from
 3 Phoenix Fibers' warehouse.

- 4 6. Testimony and/or documents demonstrating that Plaintiffs engaged
 5 investigators to determine the source of the second-quality goods being
 6 sold by Defendants, and to attempt to purchase all such available goods
 7 that had been wrongfully sold into secondary channels.

8 Evidence in Opposition to Element 2: Plaintiffs intended that Phoenix
 9 Fibers would believe that Plaintiffs did not intend to enforce their rights
 10 against Phoenix Fibers, or that Phoenix Fibers had a right to believe that
 11 Plaintiffs so intended

- 12 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 13 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 14 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 15 charge, in exchange for which Phoenix Fibers would shred those goods
 16 and convert them into shoddy fiber for use in creating end products such
 17 as insulation.

- 18 2. Testimony and/or documents demonstrating that Plaintiffs promptly
 19 contacted Phoenix Fibers regarding their discovery of Defendants'
 20 wrongful sales, in which Plaintiffs also expressed their continuing
 21 objection to such sales.

22 Evidence in Opposition to Element 3: Phoenix Fibers did not know the
 23 Plaintiffs actually objected to the sale of Plaintiffs' second-quality goods

- 24 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 25 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 26 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 27 charge, in exchange for which Phoenix Fibers would shred those goods
 28

1 and convert them into shoddy fiber for use in creating end products such
2 as insulation.

3 2. Testimony and/or documents demonstrating that Plaintiffs promptly
4 contacted Phoenix Fibers regarding their discovery of Defendants’
5 wrongful sales, in which Plaintiffs also expressed their continuing
6 objection to such sales.

7 3. Testimony and/or documents demonstrating that Phoenix Fibers’
8 representatives intentionally and repeatedly lied to Plaintiffs, claiming
9 that any second-quality goods of Plaintiffs’ that were being sold in
10 secondary channels was the result of “leakage” — *i.e.*, theft — from
11 Phoenix Fibers’ warehouse.

12 4. Testimony and/or documents demonstrating that Plaintiffs engaged
13 investigators to determine the source of the second-quality goods being
14 sold by Defendants, and to attempt to purchase all such available goods
15 that had been wrongfully sold into secondary channels.

16 5. Testimony and/or documents demonstrating that Plaintiffs commenced
17 this action within months after discovering Defendants’ wrongful sales
18 activities.

19 Evidence in Opposition to Element 4: Due to its reliance on the Plaintiffs’
20 actions, Phoenix Fibers will be materially prejudiced if Plaintiffs are
21 allowed to proceed with their claims

22 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
23 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
24 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
25 charge, in exchange for which Phoenix Fibers would shred those goods
26 and convert them into shoddy fiber for use in creating end products such
27 as insulation.
28

- 1 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
- 2 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
- 3 them into shoddy fiber.
- 4 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
- 5 quality goods sent to Phoenix Fibers were being offered for sale in
- 6 secondary consumer trade channels.
- 7 4. Testimony and/or documents demonstrating that Plaintiffs promptly
- 8 contacted Phoenix Fibers regarding their discovery of Defendants'
- 9 wrongful sales, in which Plaintiffs also expressed their continuing
- 10 objection to such sales.
- 11 5. Testimony and/or documents demonstrating that Phoenix Fibers'
- 12 representatives intentionally and repeatedly lied to Plaintiffs, claiming
- 13 that any second-quality goods of Plaintiffs' that were being sold in
- 14 secondary channels was the result of "leakage" — *i.e.*, theft — from
- 15 Phoenix Fibers' warehouse.
- 16 6. Testimony and/or documents demonstrating that Plaintiffs engaged
- 17 investigators to determine the source of the second-quality goods being
- 18 sold by Defendants, and to attempt to purchase all such available goods
- 19 that had been wrongfully sold into secondary channels.
- 20 7. Testimony and/or documents demonstrating that Plaintiffs commenced
- 21 this action within months after discovering Defendants' wrongful sales
- 22 activities.

23 C. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 3 — Waiver

24 The following is a brief description of the key evidence Plaintiffs intend to rely
 25 on in opposition to this defense, on an element-by-element basis:

26 *Evidence in Opposition to Element 1: Plaintiffs intentionally relinquished*
 27 *their known right to bring their claims with knowledge of the claims'*
 28 *existence*

- 1 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
2 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
3 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
4 charge, in exchange for which Phoenix Fibers would shred those goods
5 and convert them into shoddy fiber for use in creating end products such
6 as insulation.
- 7 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
8 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
9 them into shoddy fiber.
- 10 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
11 quality goods sent to Phoenix Fibers were being offered for sale in
12 secondary consumer trade channels.
- 13 4. Testimony and/or documents demonstrating that Plaintiffs promptly
14 contacted Phoenix Fibers regarding their discovery of Defendants'
15 wrongful sales, in which Plaintiffs also expressed their continuing
16 objection to such sales.
- 17 5. Testimony and/or documents demonstrating that Phoenix Fibers'
18 representatives intentionally and repeatedly lied to Plaintiffs, claiming
19 that any second-quality goods of Plaintiffs' that were being sold in
20 secondary channels was the result of "leakage" — *i.e.*, theft — from
21 Phoenix Fibers' warehouse.
- 22 6. Testimony and/or documents demonstrating that Plaintiffs engaged
23 investigators to determine the source of the second-quality goods being
24 sold by Defendants, and to attempt to purchase all such available goods
25 that had been wrongfully sold into secondary channels.
- 26 7. Testimony and/or documents demonstrating that Plaintiffs commenced
27 this action within months after discovering Defendants' wrongful sales
28 activities.

Evidence in Opposition to Element 2: Plaintiffs had the intent to
relinquish the right

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.

1 7. Testimony and/or documents demonstrating that Plaintiffs commenced
2 this action within months after discovering Defendants' wrongful sales
3 activities.

4 D. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 4 — Lack of
5 Consideration

6 The following is a brief description of the key evidence Plaintiffs intend to rely
7 on in opposition to this defense, with respect to its sole element — that the parties did
8 not exchange good consideration:

9 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
10 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
11 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
12 charge, in exchange for which Phoenix Fibers would shred those goods
13 and convert them into shoddy fiber for use in creating end products such
14 as insulation.

15 E. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 6 — First Sale
16 Doctrine:

17 The following is a brief description of the key evidence Plaintiffs intend to rely
18 on in opposition to this defense, on an element-by-element basis:

19 Evidence in Opposition to Element 1: Plaintiffs authorized a first sale of
20 its second-quality denim products

21 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
22 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
23 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
24 charge, in exchange for which Phoenix Fibers would shred those goods
25 and convert them into shoddy fiber for use in creating end products such
26 as insulation.

2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
 3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
 4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
 5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
 6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
- Evidence in Opposition to Element 2: Plaintiffs' second-quality denim products were not materially different from Plaintiffs' first-quality denim products*
1. Testimony and/or documents regarding the likelihood of dilution by blurring and/or tarnishment arising from Defendants' offering for sale and sale of Plaintiffs' second-quality goods.
 2. Testimony and/or documents regarding the high quality of Plaintiffs' goods that bear the MISS ME or ROCK REVIVAL marks, and the low quality of Plaintiffs' goods sold to consumers by Defendants.

1 F. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 7 — Statute of
 2 Limitations:

3 The following is a brief description of the key evidence Plaintiffs intend to rely
 4 on in opposition to this defense, with respect to its sole element — that Plaintiffs'
 5 claimed harm accrued before February 10, 2012:

- 6 1. Testimony and/or documents regarding Plaintiffs' discovery in 2015 that
 7 second-quality MISS ME and ROCK REVIVAL goods sent to Phoenix
 8 Fibers were being offered for sale in secondary consumer trade channels.

9 G. Key Evidence in Opposition to Phoenix Fibers' Aff. Def. 8 — Laches:

10 The following is a brief description of the key evidence Plaintiffs intend to rely
 11 on in opposition to this defense, on an element-by-element basis:

12 Evidence in Opposition to Element 1: Plaintiffs unreasonably delayed in
 13 asserting their claims

- 14 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 15 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 16 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 17 charge, in exchange for which Phoenix Fibers would shred those goods
 18 and convert them into shoddy fiber for use in creating end products such
 19 as insulation.
- 20 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
 21 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
 22 them into shoddy fiber.
- 23 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
 24 quality goods sent to Phoenix Fibers were being offered for sale in
 25 secondary consumer trade channels.
- 26 4. Testimony and/or documents demonstrating that Plaintiffs promptly
 27 contacted Phoenix Fibers regarding their discovery of Defendants'
 28

wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants' wrongful sales activities.

Evidence in Opposition to Element 2: Plaintiffs' delay prejudiced Wolff

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.

4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants' wrongful sales activities.

H. Key Evidence In Opposition to Phoenix Fibers' Aff. Def. 9 — Mutual Mistake:

The following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Both parties made a material mistake of fact or law in entering into the agreement

1. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs' second-quality goods.
2. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no

charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

3. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.

4. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs that were being sold in the secondary consumer market was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.

Evidence in Opposition to Element 2: Phoenix Fibers would not have agreed to enter into this contract if it had known about the mistake

1. Testimony and/or documents demonstrating that Lisa Song represented Plaintiffs in her discussions with Matt Graham of Phoenix Fibers, inquiring as to a means of destroying Plaintiffs' second-quality goods.

2. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

3. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.

I. Phoenix Fibers' Aff. Def. 10 — Failure to Mitigate:

The following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Plaintiffs' damages could have been avoided

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.

- 1 7. Testimony and/or documents demonstrating that Plaintiffs commenced
2 this action within months after discovering Defendants' wrongful sales
3 activities.

4 *Element in Opposition to Element 2: Plaintiffs failed to take reasonable*
5 *steps to avoid the damage*

- 6 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
7 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
8 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
9 charge, in exchange for which Phoenix Fibers would shred those goods
10 and convert them into shoddy fiber for use in creating end products such
11 as insulation.
- 12 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
13 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
14 them into shoddy fiber.
- 15 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
16 quality goods sent to Phoenix Fibers were being offered for sale in
17 secondary consumer trade channels.
- 18 4. Testimony and/or documents demonstrating that Plaintiffs promptly
19 contacted Phoenix Fibers regarding their discovery of Defendants'
20 wrongful sales, in which Plaintiffs also expressed their continuing
21 objection to such sales.
- 22 5. Testimony and/or documents demonstrating that Phoenix Fibers'
23 representatives intentionally and repeatedly lied to Plaintiffs, claiming
24 that any second-quality goods of Plaintiffs' that were being sold in
25 secondary channels was the result of "leakage" — *i.e.*, theft — from
26 Phoenix Fibers' warehouse.
- 27 6. Testimony and/or documents demonstrating that Plaintiffs engaged
28 investigators to determine the source of the second-quality goods being

1 sold by Defendants, and to attempt to purchase all such available goods
2 that had been wrongfully sold into secondary channels.

- 3 7. Testimony and/or documents demonstrating that Plaintiffs commenced
4 this action within four months after discovering Defendants' wrongful
5 sales activities.

6 J. Key Evidence in Opposition to U.S. General's Aff. Def. 3 — Failure to
7 Mitigate

8 The following is a brief description of the key evidence Plaintiffs intend to rely
9 on in opposition to this defense, on an element-by-element basis:

10 *Evidence in Opposition to Element 1: Plaintiffs' damages could have been*
11 *avoided*

- 12 8. Testimony and/or documents demonstrating that Ms. Song (on behalf of
13 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
14 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
15 charge, in exchange for which Phoenix Fibers would shred those goods
16 and convert them into shoddy fiber for use in creating end products such
17 as insulation.
- 18 9. Testimony and/or documents demonstrating that Mr. Graham repeatedly
19 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
20 them into shoddy fiber.
- 21 10. Testimony and/or documents regarding Plaintiffs' discovery that second-
22 quality goods sent to Phoenix Fibers were being offered for sale in
23 secondary consumer trade channels.
- 24 11. Testimony and/or documents demonstrating that Plaintiffs promptly
25 contacted Phoenix Fibers regarding their discovery of Defendants'
26 wrongful sales, in which Plaintiffs also expressed their continuing
27 objection to such sales.
- 28

12. Testimony and/or documents demonstrating that Phoenix Fibers’ representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs’ that were being sold in secondary channels was the result of “leakage” — *i.e.*, theft — from Phoenix Fibers’ warehouse.
13. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
14. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants’ wrongful sales activities.
- Element in Opposition to Element 2: Plaintiffs failed to take reasonable steps to avoid the damage
15. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
16. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs’ goods and convert them into shoddy fiber.
17. Testimony and/or documents regarding Plaintiffs’ discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
18. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants’

wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

19. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
20. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
21. Testimony and/or documents demonstrating that Plaintiffs commenced this action within four months after discovering Defendants' wrongful sales activities.

K. Key Evidence in Opposition to Comak's Aff. Def. 3 — Failure to Mitigate

The following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Plaintiffs' damages could have been avoided

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

- 1 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
2 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
3 them into shoddy fiber.
- 4 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
5 quality goods sent to Phoenix Fibers were being offered for sale in
6 secondary consumer trade channels.
- 7 4. Testimony and/or documents demonstrating that Plaintiffs promptly
8 contacted Phoenix Fibers regarding their discovery of Defendants'
9 wrongful sales, in which Plaintiffs also expressed their continuing
10 objection to such sales.
- 11 5. Testimony and/or documents demonstrating that Phoenix Fibers'
12 representatives intentionally and repeatedly lied to Plaintiffs, claiming
13 that any second-quality goods of Plaintiffs' that were being sold in
14 secondary channels was the result of "leakage" — *i.e.*, theft — from
15 Phoenix Fibers' warehouse.
- 16 6. Testimony and/or documents demonstrating that Plaintiffs engaged
17 investigators to determine the source of the second-quality goods being
18 sold by Defendants, and to attempt to purchase all such available goods
19 that had been wrongfully sold into secondary channels.
- 20 7. Testimony and/or documents demonstrating that Plaintiffs commenced
21 this action within months after discovering Defendants' wrongful sales
22 activities.

23 *Element in Opposition to Element 2: Plaintiffs failed to take reasonable*
24 *steps to avoid the damage*

- 25 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
26 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
27 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
28 charge, in exchange for which Phoenix Fibers would shred those goods

1 and convert them into shoddy fiber for use in creating end products such
2 as insulation.

3 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
4 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
5 them into shoddy fiber.

6 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
7 quality goods sent to Phoenix Fibers were being offered for sale in
8 secondary consumer trade channels.

9 4. Testimony and/or documents demonstrating that Plaintiffs promptly
10 contacted Phoenix Fibers regarding their discovery of Defendants'
11 wrongful sales, in which Plaintiffs also expressed their continuing
12 objection to such sales.

13 5. Testimony and/or documents demonstrating that Phoenix Fibers'
14 representatives intentionally and repeatedly lied to Plaintiffs, claiming
15 that any second-quality goods of Plaintiffs' that were being sold in
16 secondary channels was the result of "leakage" — *i.e.*, theft — from
17 Phoenix Fibers' warehouse.

18 6. Testimony and/or documents demonstrating that Plaintiffs engaged
19 investigators to determine the source of the second-quality goods being
20 sold by Defendants, and to attempt to purchase all such available goods
21 that had been wrongfully sold into secondary channels.

22 7. Testimony and/or documents demonstrating that Plaintiffs commenced
23 this action within four months after discovering Defendants' wrongful
24 sales activities.

1 L. Key Evidence in Opposition to Wolff's Aff. Def. 2 — Statute of
 2 Limitations

3 The following is a brief description of the key evidence Plaintiffs intend to rely
 4 on in opposition to this defense, with respect to its sole element — that Plaintiffs'
 5 claimed harm accrued before February 10, 2012:

- 6 1. Testimony and/or documents regarding Plaintiffs' discovery in 2015 that
 7 second-quality MISS ME and ROCK REVIVAL goods sent to Phoenix
 8 Fibers were being offered for sale in secondary consumer trade channels.

9 M. Key Evidence in Opposition to Wolff's Aff. Def. 3 — Failure to Mitigate

10 The following is a brief description of the key evidence Plaintiffs intend to rely
 11 on in opposition to this defense, on an element-by-element basis:

12 Evidence in Opposition to Element 1: Plaintiffs' damages could have been
 13 avoided

- 14 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 15 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 16 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 17 charge, in exchange for which Phoenix Fibers would shred those goods
 18 and convert them into shoddy fiber for use in creating end products such
 19 as insulation.
- 20 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
 21 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
 22 them into shoddy fiber.
- 23 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
 24 quality goods sent to Phoenix Fibers were being offered for sale in
 25 secondary consumer trade channels.
- 26 4. Testimony and/or documents demonstrating that Plaintiffs promptly
 27 contacted Phoenix Fibers regarding their discovery of Defendants'
 28

wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants' wrongful sales activities.

Element in Opposition to Element 2: Plaintiffs failed to take reasonable steps to avoid the damage

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.

4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within four months after discovering Defendants' wrongful sales activities.

N. Key Evidence in Opposition to Wolff's Aff. Def. 4 — Waiver

The following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Plaintiffs intentionally relinquished their known right to bring their claims with knowledge of the claims' existence

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants' wrongful sales activities.

Evidence in Opposition to Element 2: Plaintiffs had the intent to relinquish the right

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods

1 and convert them into shoddy fiber for use in creating end products such
2 as insulation.

3 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
4 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
5 them into shoddy fiber.

6 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
7 quality goods sent to Phoenix Fibers were being offered for sale in
8 secondary consumer trade channels.

9 4. Testimony and/or documents demonstrating that Plaintiffs promptly
10 contacted Phoenix Fibers regarding their discovery of Defendants'
11 wrongful sales, in which Plaintiffs also expressed their continuing
12 objection to such sales.

13 5. Testimony and/or documents demonstrating that Phoenix Fibers'
14 representatives intentionally and repeatedly lied to Plaintiffs, claiming
15 that any second-quality goods of Plaintiffs' that were being sold in
16 secondary channels was the result of "leakage" — *i.e.*, theft — from
17 Phoenix Fibers' warehouse.

18 6. Testimony and/or documents demonstrating that Plaintiffs engaged
19 investigators to determine the source of the second-quality goods being
20 sold by Defendants, and to attempt to purchase all such available goods
21 that had been wrongfully sold into secondary channels.

22 7. Testimony and/or documents demonstrating that Plaintiffs commenced
23 this action within months after discovering Defendants' wrongful sales
24 activities.

25 O. Key Evidence in Opposition to Wolff's Aff. Def. 5 — Estoppel

26 The following is a brief description of the key evidence Plaintiffs intend to rely
27 on in opposition to this defense, on an element-by-element basis:
28

Evidence in Opposition to Element 1: Plaintiffs knew that Phoenix Fibers was selling Plaintiffs' second-quality goods

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
3. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
4. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.

Evidence in Opposition to Element 2: Plaintiffs intended that Phoenix Fibers would believe that Plaintiffs did not intend to enforce their rights against Phoenix Fibers, or that Phoenix Fibers had a right to believe that Plaintiffs so intended

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

2. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

Evidence in Opposition to Element 3: Phoenix Fibers did not know the Plaintiffs actually objected to the sale of Plaintiffs' second-quality goods

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.

2. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

3. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming

1 that any second-quality goods of Plaintiffs' that were being sold in
 2 secondary channels was the result of "leakage" — *i.e.*, theft — from
 3 Phoenix Fibers' warehouse.

4 4. Testimony and/or documents demonstrating that Plaintiffs engaged
 5 investigators to determine the source of the second-quality goods being
 6 sold by Defendants, and to attempt to purchase all such available goods
 7 that had been wrongfully sold into secondary channels.

8 5. Testimony and/or documents demonstrating that Plaintiffs commenced
 9 this action within months after discovering Defendants' wrongful sales
 10 activities.

11 Evidence in Opposition to Element 4: Due to its reliance on the Plaintiffs'
 12 actions, Phoenix Fibers will be materially prejudiced if Plaintiffs are
 13 allowed to proceed with their claims

14 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 15 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 16 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 17 charge, in exchange for which Phoenix Fibers would shred those goods
 18 and convert them into shoddy fiber for use in creating end products such
 19 as insulation.

20 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
 21 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
 22 them into shoddy fiber.

23 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
 24 quality goods sent to Phoenix Fibers were being offered for sale in
 25 secondary consumer trade channels.

26 4. Testimony and/or documents demonstrating that Plaintiffs promptly
 27 contacted Phoenix Fibers regarding their discovery of Defendants'
 28

wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.

5. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
6. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.
7. Testimony and/or documents demonstrating that Plaintiffs commenced this action within months after discovering Defendants' wrongful sales activities.

P. Key Evidence in Opposition to Wolff's Aff. Def. 6 — Unclean Hands

The following is a brief description of the key evidence Plaintiffs intend to rely on in opposition to this defense, on an element-by-element basis:

Evidence in Opposition to Element 1: Plaintiffs engaged in inequitable conduct

1. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
2. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.

1 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
2 quality goods sent to Phoenix Fibers were being offered for sale in
3 secondary consumer trade channels.

4 4. Testimony and/or documents demonstrating that Plaintiffs promptly
5 contacted Phoenix Fibers regarding their discovery of Defendants'
6 wrongful sales, in which Plaintiffs also expressed their continuing
7 objection to such sales.

8 5. Testimony and/or documents demonstrating that Phoenix Fibers'
9 representatives intentionally and repeatedly lied to Plaintiffs, claiming
10 that any second-quality goods of Plaintiffs' that were being sold in
11 secondary channels was the result of "leakage" — *i.e.*, theft — from
12 Phoenix Fibers' warehouse.

13 6. Testimony and/or documents demonstrating that Plaintiffs engaged
14 investigators to determine the source of the second-quality goods being
15 sold by Defendants, and to attempt to purchase all such available goods
16 that had been wrongfully sold into secondary channels.

17 7. Testimony and/or documents demonstrating that Plaintiffs commenced
18 this action within months after discovering Defendants' wrongful sales
19 activities.

20 *Evidence in Opposition to Element 2: Plaintiffs' conduct directly relates*
21 *to the claims they have asserted against Wolff*

22 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
23 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
24 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
25 charge, in exchange for which Phoenix Fibers would shred those goods
26 and convert them into shoddy fiber for use in creating end products such
27 as insulation.
28

- 1 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
2 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
3 them into shoddy fiber.
- 4 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
5 quality goods sent to Phoenix Fibers were being offered for sale in
6 secondary consumer trade channels.
- 7 4. Testimony and/or documents demonstrating that Plaintiffs promptly
8 contacted Phoenix Fibers regarding their discovery of Defendants'
9 wrongful sales, in which Plaintiffs also expressed their continuing
10 objection to such sales.
- 11 5. Testimony and/or documents demonstrating that Phoenix Fibers'
12 representatives intentionally and repeatedly lied to Plaintiffs, claiming
13 that any second-quality goods of Plaintiffs' that were being sold in
14 secondary channels was the result of "leakage" — *i.e.*, theft — from
15 Phoenix Fibers' warehouse.
- 16 6. Testimony and/or documents demonstrating that Plaintiffs engaged
17 investigators to determine the source of the second-quality goods being
18 sold by Defendants, and to attempt to purchase all such available goods
19 that had been wrongfully sold into secondary channels.
- 20 7. Testimony and/or documents demonstrating that Plaintiffs commenced
21 this action within months after discovering Defendants' wrongful sales
22 activities.

23 *Evidence in Opposition to Element 3: Plaintiffs' conduct injured Wolff*

- 24 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
25 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
26 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
27 charge, in exchange for which Phoenix Fibers would shred those goods
28

1 and convert them into shoddy fiber for use in creating end products such
2 as insulation.

3 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
4 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
5 them into shoddy fiber.

6 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
7 quality goods sent to Phoenix Fibers were being offered for sale in
8 secondary consumer trade channels.

9 4. Testimony and/or documents demonstrating that Plaintiffs promptly
10 contacted Phoenix Fibers regarding their discovery of Defendants'
11 wrongful sales, in which Plaintiffs also expressed their continuing
12 objection to such sales.

13 5. Testimony and/or documents demonstrating that Phoenix Fibers'
14 representatives intentionally and repeatedly lied to Plaintiffs, claiming
15 that any second-quality goods of Plaintiffs' that were being sold in
16 secondary channels was the result of "leakage" — *i.e.*, theft — from
17 Phoenix Fibers' warehouse.

18 6. Testimony and/or documents demonstrating that Plaintiffs engaged
19 investigators to determine the source of the second-quality goods being
20 sold by Defendants, and to attempt to purchase all such available goods
21 that had been wrongfully sold into secondary channels.

22 7. Testimony and/or documents demonstrating that Plaintiffs commenced
23 this action within four months after discovering Defendants' wrongful
24 sales activities.

25 Q. Key Evidence in Opposition to Wolff's Aff. Def. 7 — Laches

26 The following is a brief description of the key evidence Plaintiffs intend to rely
27 on in opposition to this defense, on an element-by-element basis:
28

Evidence in Opposition to Element 1: Plaintiffs unreasonably delayed in asserting their claims

8. Testimony and/or documents demonstrating that Ms. Song (on behalf of Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no charge, in exchange for which Phoenix Fibers would shred those goods and convert them into shoddy fiber for use in creating end products such as insulation.
9. Testimony and/or documents demonstrating that Mr. Graham repeatedly represented that Phoenix Fibers would shred Plaintiffs' goods and convert them into shoddy fiber.
10. Testimony and/or documents regarding Plaintiffs' discovery that second-quality goods sent to Phoenix Fibers were being offered for sale in secondary consumer trade channels.
11. Testimony and/or documents demonstrating that Plaintiffs promptly contacted Phoenix Fibers regarding their discovery of Defendants' wrongful sales, in which Plaintiffs also expressed their continuing objection to such sales.
12. Testimony and/or documents demonstrating that Phoenix Fibers' representatives intentionally and repeatedly lied to Plaintiffs, claiming that any second-quality goods of Plaintiffs' that were being sold in secondary channels was the result of "leakage" — *i.e.*, theft — from Phoenix Fibers' warehouse.
13. Testimony and/or documents demonstrating that Plaintiffs engaged investigators to determine the source of the second-quality goods being sold by Defendants, and to attempt to purchase all such available goods that had been wrongfully sold into secondary channels.

1 14. Testimony and/or documents demonstrating that Plaintiffs commenced
2 this action within months after discovering Defendants' wrongful sales
3 activities.

4 *Evidence in Opposition to Element 2: Plaintiffs' delay prejudiced Wolff*

5 15. Testimony and/or documents demonstrating that Ms. Song (on behalf of
6 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
7 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
8 charge, in exchange for which Phoenix Fibers would shred those goods
9 and convert them into shoddy fiber for use in creating end products such
10 as insulation.

11 16. Testimony and/or documents demonstrating that Mr. Graham repeatedly
12 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
13 them into shoddy fiber.

14 17. Testimony and/or documents regarding Plaintiffs' discovery that second-
15 quality goods sent to Phoenix Fibers were being offered for sale in
16 secondary consumer trade channels.

17 18. Testimony and/or documents demonstrating that Plaintiffs promptly
18 contacted Phoenix Fibers regarding their discovery of Defendants'
19 wrongful sales, in which Plaintiffs also expressed their continuing
20 objection to such sales.

21 19. Testimony and/or documents demonstrating that Phoenix Fibers'
22 representatives intentionally and repeatedly lied to Plaintiffs, claiming
23 that any second-quality goods of Plaintiffs' that were being sold in
24 secondary channels was the result of "leakage" — *i.e.*, theft — from
25 Phoenix Fibers' warehouse.

26 20. Testimony and/or documents demonstrating that Plaintiffs engaged
27 investigators to determine the source of the second-quality goods being
28

1 sold by Defendants, and to attempt to purchase all such available goods
2 that had been wrongfully sold into secondary channels.

- 3 21. Testimony and/or documents demonstrating that Plaintiffs commenced
4 this action within months after discovering Defendants' wrongful sales
5 activities.

6 R. Key Evidence in Opposition to Cho's Aff. Def. 3 — Failure to Mitigate

7 The following is a brief description of the key evidence Plaintiffs intend to rely
8 on in opposition to this defense, on an element-by-element basis:

9 Evidence in Opposition to Element 1: Plaintiffs' damages could have been
10 avoided

- 11 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
12 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
13 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
14 charge, in exchange for which Phoenix Fibers would shred those goods
15 and convert them into shoddy fiber for use in creating end products such
16 as insulation.
- 17 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
18 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
19 them into shoddy fiber.
- 20 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
21 quality goods sent to Phoenix Fibers were being offered for sale in
22 secondary consumer trade channels.
- 23 4. Testimony and/or documents demonstrating that Plaintiffs promptly
24 contacted Phoenix Fibers regarding their discovery of Defendants'
25 wrongful sales, in which Plaintiffs also expressed their continuing
26 objection to such sales.
- 27 5. Testimony and/or documents demonstrating that Phoenix Fibers'
28 representatives intentionally and repeatedly lied to Plaintiffs, claiming

1 that any second-quality goods of Plaintiffs' that were being sold in
 2 secondary channels was the result of "leakage" — *i.e.*, theft — from
 3 Phoenix Fibers' warehouse.

4 6. Testimony and/or documents demonstrating that Plaintiffs engaged
 5 investigators to determine the source of the second-quality goods being
 6 sold by Defendants, and to attempt to purchase all such available goods
 7 that had been wrongfully sold into secondary channels.

8 7. Testimony and/or documents demonstrating that Plaintiffs commenced
 9 this action within months after discovering Defendants' wrongful sales
 10 activities.

11 Element in Opposition to Element 2: Plaintiffs failed to take reasonable
 12 steps to avoid the damage

13 1. Testimony and/or documents demonstrating that Ms. Song (on behalf of
 14 Plaintiffs) and Mr. Graham (on behalf of Phoenix Fibers) agreed that
 15 Plaintiffs would deliver their second-quality goods to Phoenix Fibers at no
 16 charge, in exchange for which Phoenix Fibers would shred those goods
 17 and convert them into shoddy fiber for use in creating end products such
 18 as insulation.

19 2. Testimony and/or documents demonstrating that Mr. Graham repeatedly
 20 represented that Phoenix Fibers would shred Plaintiffs' goods and convert
 21 them into shoddy fiber.

22 3. Testimony and/or documents regarding Plaintiffs' discovery that second-
 23 quality goods sent to Phoenix Fibers were being offered for sale in
 24 secondary consumer trade channels.

25 4. Testimony and/or documents demonstrating that Plaintiffs promptly
 26 contacted Phoenix Fibers regarding their discovery of Defendants'
 27 wrongful sales, in which Plaintiffs also expressed their continuing
 28 objection to such sales.

- 1 5. Testimony and/or documents demonstrating that Phoenix Fibers’
2 representatives intentionally and repeatedly lied to Plaintiffs, claiming
3 that any second-quality goods of Plaintiffs’ that were being sold in
4 secondary channels was the result of “leakage” — *i.e.*, theft — from
5 Phoenix Fibers’ warehouse.
- 6 6. Testimony and/or documents demonstrating that Plaintiffs engaged
7 investigators to determine the source of the second-quality goods being
8 sold by Defendants, and to attempt to purchase all such available goods
9 that had been wrongfully sold into secondary channels.
- 10 7. Testimony and/or documents demonstrating that Plaintiffs commenced
11 this action within months after discovering Defendants’ wrongful sales
12 activities.

13 **VII. Evidentiary Issues**

14 During summary judgment briefing, Phoenix Fibers raised numerous issues
15 relating to the authenticity of various documents cited by Plaintiffs. This motion has
16 yet to be decided by the Court. While Plaintiffs do not agree that any evidentiary
17 issues exist, Plaintiffs anticipate that any documents offered into evidence at trial will
18 be properly authenticated.

19 Given that discovery is ongoing, the Parties have agreed and stipulated that any
20 motions *in limine* should be filed closer in time to the commencement of trial, and on
21 a date to be determined at the Final Pretrial Conference, currently scheduled for
22 March 27, 2017. Currently, Plaintiffs anticipate filing a number of motions *in limine*,
23 including without limitation a motion to exclude the testimony to be offered by
24 Defendant Phoenix Fibers’ expert Jana M. Hawley. Plaintiffs also understand that
25 Phoenix Fibers anticipates that it will file a number of Motions *in Limine*, as well as a
26 *Daubert* Motion under Federal Rule of Evidence 702 with respect to certain portions
27 of the testimony to be offered by Plaintiffs’ expert Juli Saitz.
28

VIII. Legal Issues

Plaintiffs anticipate that there will be at least one issue of law regarding the correct interpretation of the Lanham Act. Phoenix Fibers has asserted in its pending summary judgment motion that its wrongful sales of Plaintiffs' second-quality MISS ME and ROCK REVIVAL products are covered by the first sale doctrine. As Plaintiffs explained in their opposition brief, however, the first sale doctrine does not apply where — like here — post-sale confusion is at issue. *See* Dkt. No. 97 at 17 (citing *Au-Tomotive Gold v. Volkswagen of Am.*, 603 F.3d 1133 (9th Cir. 2010)). As the Ninth Circuit explained in *Au-Tomotive Gold*: “Post-purchase confusion creates a free-rider problem.... When a producer purchases a trademarked product, that producer is not purchasing the trademark.... If a producer profits from a trademark because of post-purchase confusion about the product’s origin, the producer is, to that degree, a free-rider.” *Au-Tomotive Gold*, 603 F.3d at 1138–39.

Plaintiffs anticipate that additional issues may be discovered as the parties exchange proposed jury charges.

L.R. 16-4.3 BIFURCATION OF ISSUES

Plaintiffs do not make a request for bifurcation. Plaintiffs understand that Phoenix Fibers intends to file a motion to sever the cross-claims of U.S. General and Wolff against Phoenix Fibers. Plaintiffs also understand that Phoenix Fibers intends to file a motion to sever the trial of Plaintiffs' claims against all other Defendants in this matter, so that those claims are heard in a separate, subsequent trial. Plaintiffs do not consent to either of Phoenix Fibers' anticipated motions, and intend to oppose them.

L.R. 16-4.4 JURY TRIAL

Defendants have demanded a jury trial with respect to legal issues. Less than all issues, however, are triable to a jury, as set forth below.

IX. Issues Triable to the Jury

The following issues are triable to the jury:

- 1 1. Whether a contract existed between Plaintiffs and Phoenix Fibers, *see*,
2 *e.g.*, *Vita Planning & Landscape Architecture, Inc. v. HKS Architects,*
3 *Inc.*, 192 Cal. Rptr. 3d 838, 844 (Cal. App. 2015), *review denied* (Jan. 13,
4 2016).
- 5 2. Whether Phoenix Fibers breached the parties' contract, *see, e.g.*, *Palmiero*
6 *v. Spada Distrib. Co.*, 217 F.2d 561, 565 (9th Cir. 1954).
- 7 3. Whether Plaintiffs' MISS ME and ROCK REVIVAL trademarks are valid
8 and protectable, *see, e.g.*, *Mophie, Inc. v. Shah*, 2014 WL 10988347, at
9 *19 (C.D. Cal. Nov. 12, 2014).
- 10 4. Whether there is a likelihood of confusion among consumers who observe
11 such product in the post-sale marketplace, as to the source, sponsorship,
12 affiliation, or approval of the goods, *see, e.g.*, *Clicks Billiards, Inc. v.*
13 *Sixshooters, Inc.*, 251 F.3d 1252, 1265 (9th Cir. 2001).
- 14 5. Whether Defendants acted willfully, *see, e.g.*, *N. Face Apparel Corp. v.*
15 *Dahan*, 2014 WL 12558010, at *18 (C.D. Cal. Oct. 6, 2014).
- 16 6. Whether Plaintiffs' MISS ME and ROCK REVIVAL trademarks are
17 famous in the State of California, *see, e.g.*, *Acad. of Motion Picture Arts*
18 *& Scis. v. GoDaddy.com, Inc.*, 2015 WL 12684340, at *9 (C.D. Cal. Apr.
19 10, 2015); *Eszlinger v. United Studios of Self Defense, Inc.*, 2012 WL
20 12336801, at *4 (Cal. Super. Feb. 28, 2012).
- 21 7. Whether there is a likelihood of dilution, *see, e.g.*, *Visa Int'l Serv. Ass'n v.*
22 *JSL Corp.*, 610 F.3d 1088, 1090 (9th Cir. 2010).
- 23 8. The amount of damages, *see, e.g.*, *Young v. Wideawake Death Row Entm't*
24 *LLC*, 2011 WL 12565250, at *12 (C.D. Cal. Apr. 19, 2011).
- 25 9. Whether Plaintiffs' claims are barred by the unclean hands doctrine, *see*,
26 *e.g.*, *Fnbm-Rescon I LLC v. Citrus El Dorado LLC*, 2015 WL 11416171,
27 at *8 (C.D. Cal. Feb. 6, 2015).
- 28 10. Whether Plaintiffs' claims are barred by the laches doctrine, *see, e.g.*, *id.*

X. Issues Triable to the Court

The following issues are triable to the Court:

1. Plaintiffs' claims for restitution and injunctive relief, *see, e.g.*, 5 U.S.C. § 1116(a); Cal. Bus. & Prof. Code §§ 14247, 17200 *et seq.*
2. Plaintiffs' claims for the disgorgement of Defendants' wrongful profits, *see, e.g., Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1075 (9th Cir. 2015).
3. The parties' claims for attorneys' fees under applicable law, *see, e.g.*, 15 U.S.C. § 1117(a).
4. Whether Plaintiffs are estopped from maintaining their claims, *see, e.g., Platt Pac., Inc. v. Andelson*, 862 P.2d 158, 166 (Cal. 1993) ("Generally, the determination of either waiver or estoppel is a question of fact When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law").
5. Whether Plaintiffs waived their rights to maintain their claims, *see, e.g., Platt Pac., Inc.*, 862 P.2d at 166 ("Generally, the determination of either waiver or estoppel is a question of fact When, however, the facts are undisputed and only one inference may reasonably be drawn, the issue is one of law").
6. Whether Plaintiffs' claims are barred by the statute of limitations, *see, e.g., B. Braun Med., Inc. v. Rogers*, 163 F. App'x 500, 504 (9th Cir. 2006) ("While resolution of the statute of limitations issue is normally a question of fact, where the uncontradicted facts established through discovery are susceptible of only one legitimate inference, a court may determine a statute of limitations issue as a matter of law.").
7. Whether Plaintiffs failed to reasonably mitigate their damages, *see, e.g., Green v. Smith*, 67 Cal. Rptr. 796, 801 (Cal. Ct. App. 1968) (while failure

1 to mitigate is usually a question of fact, it may be resolved as a matter of
 2 law where the underlying facts are undisputed).

3 **L.R. 16-4.5 ATTORNEYS' FEES**

4 Plaintiffs seek to recover their attorneys' fees pursuant to 15 U.S.C. § 1117(a).
 5 Section 1117(a) provides that the court may award such fees to the prevailing party in
 6 "exceptional cases." *Id.* "Exceptional cases include cases in which the infringement
 7 is malicious, fraudulent, deliberate, or willful." *Horphag Research Ltd. v. Pellegrini*,
 8 337 F.3d 1036, 1042 (9th Cir. 2003). As described above, Plaintiffs intend to offer
 9 evidence demonstrating Defendants' bad faith and willfulness in offering for sale and
 10 selling Plaintiffs' second-quality MISS ME and ROCK REVIVAL products.

11 **L.R. 16-4.6 ABANDONMENT OF ISSUES**

12 Plaintiffs are not abandoning any of their claims. Plaintiffs understand that
 13 Phoenix Fibers is abandoning its first, second, and fifth affirmative defenses. Other
 14 than Phoenix Fibers, Plaintiffs are not aware of whether Defendants have abandoned
 15 any of their defenses.

16
 17 Dated: March 6, 2017

ARNOLD & PORTER KAY SCHOLER LLP

18 By: /s/ Matthew T. Salzmann

19 John C. Ulin

20 Eric D. Mason

21 Louis S. Ederer

Matthew T. Salzmann

22 *Attorneys for Plaintiffs*